

STATE OF MICHIGAN
COURT OF APPEALS

AIDA A. NASOURI and GHASSAN J.
NASOURI,

UNPUBLISHED
February 21, 2006

Plaintiffs-Appellees,

v

No. 257672
Lapeer Circuit Court
LC No. 00-029016-CK

LEROY WENDELL HAYWARD and LINDA
JOANNE HAYWARD,

Defendants-Appellants,

and

CENTURY 21 SUNRISE, CAROL CRIST, and
INSPECTION PROTECTIONS, INC.,

Defendants.

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendants Leroy and Linda Hayward appeal as of right from the circuit court's order denying their request for costs and attorney fees. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiffs purchased a home from defendants, but several months later filed suit, alleging that the home contained numerous undisclosed defects. These concerned the condition of the furnace, electrical fixtures, state of cleanliness, presence of vermin, electrical system and wiring, the presence of water in the basement, and the outside walls. Plaintiffs alleged breach of contract, fraud, and negligence against defendants.

Initially, defendants were denied summary disposition, but, taking advantage of certain of plaintiffs' representations made when plaintiffs later offered the house for sale, they later obtained summary disposition.¹ In granting the renewed motion, the trial court stated:

¹ Defendants Carol Crist and Century 2 Sunrise obtained summary disposition in August 2002, and defendant Inspection Protections, Inc., was dismissed for lack of progress.

The Defendants Hayward bring this renewed motion for summary disposition claiming that [plaintiffs] listed the home that is subject of this lawsuit . . . for a price that was \$91,400 more than when they purchased the home from the Haywards, less than three years earlier. The Defendants further assert[] that the Plaintiffs also signed a Seller Disclosure Statement themselves which states the following: That there has been no evidence of water in the basement; that there are no roof leaks; the condition of the septic system is good; the plumbing system has no problems; there is no history of infestation and there are essentially no problems with the home.

Defendants moved for costs and attorney fees, on the ground that plaintiffs' claim was frivolous. In denying the motion, the trial court stated as follows:

This Court finds that [plaintiffs'] claim for fraud was not frivolous Although Plaintiffs' theory was unsuccessful, this court does not find it to be completely "devoid" of legal merit and, although tenuous, Plaintiffs' theory was supported by legal authority. Further, there is nothing in the record to support a finding that Plaintiffs' primary purpose was either to "harass, embarrass, or injure" Leroy and Linda Haywards [sic], or that Plaintiffs had "no reasonable basis to believe that the facts underlying its legal position were in fact true."

We review a trial court's decision on a request for costs and fees for an abuse of discretion. See *In re Condemnation of Private Property for Highway Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997). An "abuse of discretion will be found when the decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). "A trial court's finding with regard to whether a claim or defense was frivolous will not be disturbed on appeal unless the finding is clearly erroneous." *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1991).

MCL 600.2591 authorizes awards of costs and attorney fees to the prevailing party in a frivolous civil action, which subsection (3)(a) defines as one where the primary purpose of a party is to "harass, embarrass, or injure the prevailing party," where the party had "no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or where the party maintained a legal position that was "devoid of arguable legal merit." Defendants assert that plaintiffs set forth untrue factual allegations and lacked any legal basis for their fraud claim. We disagree.

Defendants argue that because plaintiffs accepted the results of an inspection of the house which revealed no insect infestation, no such condition could be considered a concealed defect. See *Conahan v Fisher*, 186 Mich App 48, 50; 463 NW2d 118 (1990). However, the allegation of an insect infestation was but one of many upon which plaintiffs based their claim of fraud. If the evidence indicates that that specific allegation was not well grounded in fact, that does not mean that plaintiffs were equally without justification in alleging that defendants fraudulently misrepresented any of the many other conditions upon which they premised their claim. Defendants point out that they and plaintiffs never met until the closing and assert for this reason

that they could not have made any representations to plaintiffs. Defendants cite no authority for the proposition that only face-to-face communications can give rise to a claim of fraud. For these reasons, defendants' argument that plaintiffs could not reasonably have asserted that they had relied on some misrepresentations from them must fail.

Concerning plaintiffs' having set forth untrue factual allegations, defendants argue that refusing to award costs and fees on the ground that there was some reasonable factual basis for plaintiffs' position in court was inconsistent with granting summary disposition in response to plaintiffs' having later contradicted their factual assertions against them. However, that a party does not ultimately prevail does not indicate that the party's position was frivolous. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

We note that, after revisiting the home to see what plaintiffs had done with it, defendants' relative reported observing an "electrical box upgrade and perhaps new appliances." This observation comports with plaintiffs' allegations that they took the house with a faulty electrical system and fixtures. The relative additionally reported that plaintiffs had "made a number of 'improvements' to the exterior of the home," which conceivably could have addressed pre-existing problems with drainage or the outside walls. Again, if some, or even most, of plaintiffs' allegations were not well grounded in fact, this does not mean that none was.

If plaintiffs and their attorney did not act commendably in including among their factual allegations some items that were ascertainably not true, or in otherwise exaggerating the extent of the deficiencies of which they complained, this does not necessarily compel the conclusion that plaintiffs and their attorney wholly fabricated their case against defendants. Although the clear indications that plaintiffs in some instances overstated the factual bases for their claims against defendants do not present plaintiffs in a sympathetic light, because the record suggests that there was some factual basis for at least some of plaintiffs' assertions, the trial court did not abuse its discretion in declining to award defendants costs and attorney fees in this matter.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald